

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

5-0
BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA COURT

No. 18,785

103

WILLIAM C. ALLEY,

vs.

Appellant,

DALE C. CAMERON,

Appellee.

Forma Pauperis Appeal from an Order of the United States District Court
for the District of Columbia Discharging a Writ of Habeas Corpus
and Dismissing the Petition for a Writ of Habeas Corpus

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United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 10 1964

Nathan J. Paulson
CLERK

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Was the Appellant denied an adequate independent psychiatric examination as required by due process where the court appointed psychiatrist was not available for examination at the hearing and where his written report failed to indicate the scope of his examination and the facts upon which his opinion was based?

2. Was the District Court's refusal to order a conditional release arbitrary and erroneous in view of the evidence presented?

3. Does D. C. Code §24-301(d) create an unconstitutional deprivation of liberty without due process of law by providing for indefinite confinement in a mental hospital of a person who has never been adjudged insane where the statute fails to provide a procedure which casts the burden on the government to prove that such persons are mentally ill as a pre-requisite to continued confinement?

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE
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No. 18,785

WILLIAM C. ALLEY,

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Appellee.

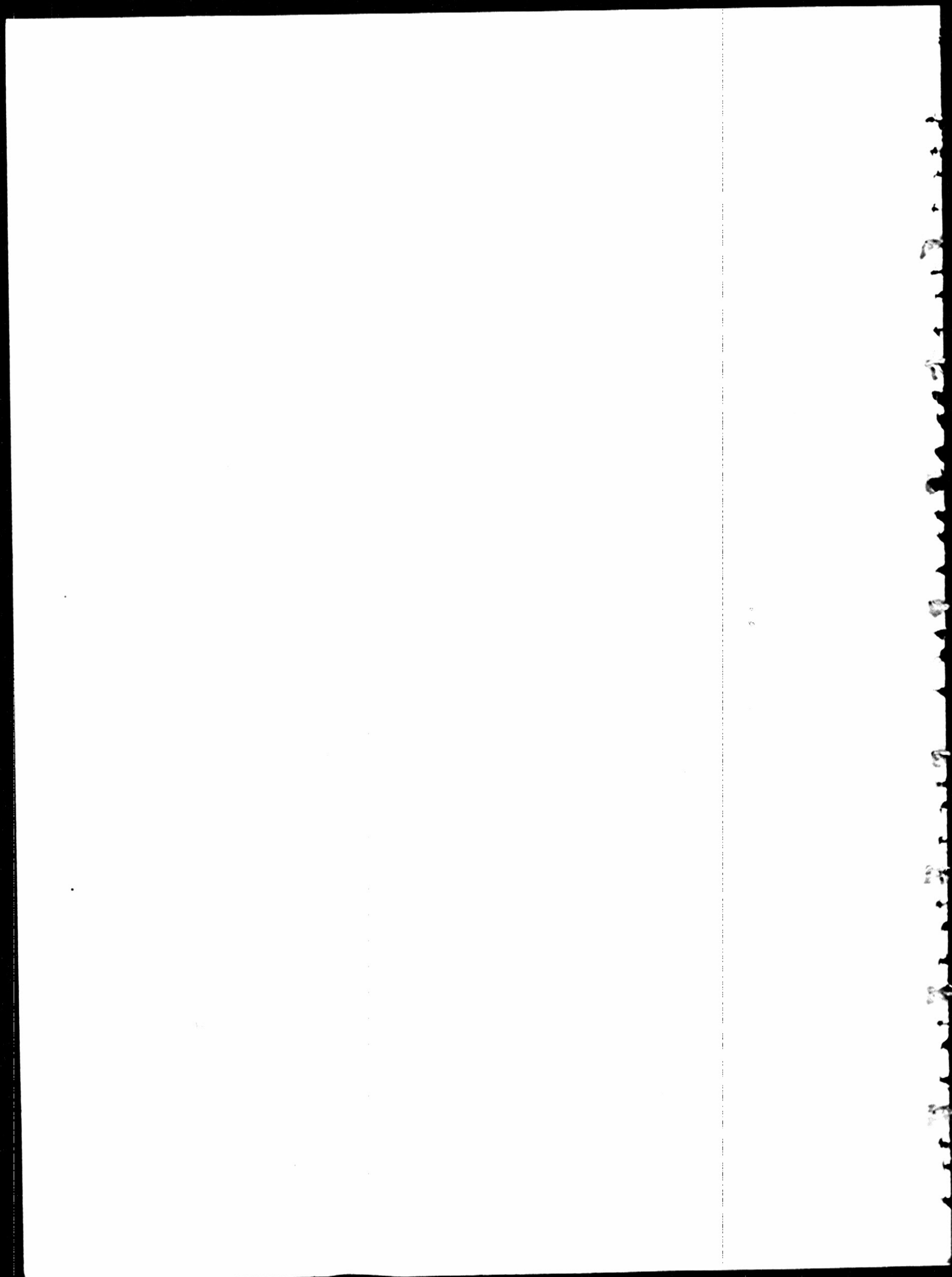
Forma Pauperis Appeal from an Order of the United States District Court
for the District of Columbia Discharging a Writ of Habeas Corpus and
Dismissing the Petition for a Writ of Habeas Corpus.

JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the District of Columbia discharging a writ of habeas corpus and dismissing Appellant's petition for a writ of habeas corpus. This Court has jurisdiction of the appeal under 28 U.S.C. §1291. The appeal was allowed in forma pauperis by this Court.

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STATEMENT OF THE CASE

William C. Alley was tried in a non-jury case on charges of forgery and uttering in connection with a narcotics prescription on September 5, 1964, Criminal Case No. 734-61; was found not guilty by reason of insanity; and, on the same day, was committed to St. Elizabeth's Hospital, pursuant to D. C. Code §24-301(d).

In early 1963, the Appellant filed a petition for a writ of habeas corpus asking for an independent psychiatric examination, Habeas Corpus No. 107-63. The petition was denied. On September 23, 1963, Appellant filed a second petition for a writ of habeas corpus which was denied, Habeas Corpus No. 383-63. However, upon Appellant's pointing out the decision of this Court in Watson v. Cameron, 114 U.S. App. D. C. 151, 312 F. 2d 878 (1962) which held that an indigent confined for over a year was entitled to an independent psychiatric examination, the District Court, on December 18, 1963, issued a writ of habeas corpus and, on January 6, 1964, issued an order directing Legal Psychiatric Services to conduct an independent psychiatric examination of the Appellant, Habeas Corpus No. 397-63. The report of such examination by Dr. David Lanham was filed with the District Court on February 26, 1964.

On March 25, 1964, the hearing on the petition was held. At the hearing, Dr. Lanham did not testify, although appellant's counsel expected him to be there [Tr. 1]. However, Dr. Lanham's written report was admitted [Tr. 11]. In that report [Appellant's Ex. A], Dr. Lanham stated his opinion that Appellant continued to suffer from a mental disorder, sociopathic personality disturbance, drug addiction; that the likelihood would be that Appellant would revert to the use of drugs when released, using whatever means available to obtain them, but that he would not be likely to commit crimes using force and violence, but his offenses would primarily be against property. Dr. Lanham's report stated that it was based upon an interview with the Appellant, an examination of the hospital records and the appellant's history of drug addiction from an early age. The extent of the interview or the inspection of the hospital records, and any facts relating thereto were omitted from the report.

The Appellant testified in his own behalf [Tr. 2-11] to the effect that he did not intend to resume the use of drugs [Tr. 6, 8, 10, 11] and that he intended to resume his trade of house painting to earn a livelihood [Tr. 6, 7]. The Appellant is fifty years of age and has not been using drugs since his pre-trial admission to St. Elizabeth's on August 29, 1961, i.e., for over three years and two months.

Dr. Dorothy Dobbs, a staff psychiatrist at St. Elizabeth's Hospital, testified for the appellee. She testified that Alley had a sociopathic personality disturbance, drug addiction which she described as immature behavior, inability to tolerate anxiety and frustration, the need for immediate gratification and a disregard for others [Tr. 12, 13]. Dr. Dobbs testified that, if Alley were released, in her opinion he would revert to drugs and perhaps steal to support his habit, but would be unlikely to resort to personal violence [Tr. 14, 15]. She admitted that some psychiatrists did not regard sociopathic personality disturbance as a mental illness, and that she regarded it as a mental illness only in some cases [Tr. 15].

At the time of the criminal trial, Alley was diagnosed as suffering from a chronic brain syndrome associated with nutritional disturbance, narcotic addiction and as not suffering from mental deficiency [Letter from Dr. Overholser of St. Elizabeth's to the Clerk of the Criminal Division of the District Court, dated June 18, 1962]. St. Elizabeth's Hospital records show that the change of diagnosis to sociopathic personality disturbance, drug addiction was recommended on February 19, 1963.

With respect to treatment and rehabilitation, the testimony of Dr. Dobbs clearly indicated that the current choices were incarceration

or release, that incarceration per se would not cure the Appellant, and that the only way to test her beliefs would be to conditionally release Mr. Alley [Tr. 16, 17]. Dr. Lanham's report never considered the question of conditional release.

The District Court's decision, in denying a conditional release, was based upon an unwillingness to disregard the medical testimony [Tr. 20].

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 24, D. C. Code, Sections 301(d), (e) and (g) provide:

(d) If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is

in a condition to be conditionally released under supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section: Provided, That the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

* * * * *

(g) Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

Amendment 5, United States Constitution, provides in part:

"No person shall be deprived of life, liberty or property without due process of law"

STATEMENT OF POINTS

Appellant intends to rely upon the following points in this appeal.

1. The court below erred in discharging the writ where the Appellant was denied an adequate independent psychiatric examination when the court appointed psychiatrist was not available for examination at the hearing and his written report failed to indicate the scope of his examination and the facts upon which his opinion was based.

2. The court below erred in not granting a conditional release in view of the evidence presented.

3. D. C. Code §24-301(d) is unconstitutional because it provides for indefinite confinement in a mental hospital of persons who have never been adjudged insane, without providing any procedure which casts the burden on the government to prove that such persons are mentally ill as a prerequisite to continued confinement.

SUMMARY OF ARGUMENT

The due process right of an indigent to receive an adequate independent psychiatric examination by a court appointed psychiatrist was effectively denied Appellant where such psychiatrist was not available for examination at the hearing; where the appointed psychiatrist is known from his testimony in prior court hearings to hold the same opinion as the confining institution with respect to whether a diagnosed sociopath has an abnormal mental condition although a non-indigent petitioner has access to a large body of medical experts who do not agree with St. Elizabeth's Hospital that a sociopath suffers from an abnormal mental condition; and where the opinion letter of such doctor reports mere opinion unsupported by underlying facts and fails to disclose the scope of his examination which was limited to an interview with Appellant of approximately thirty minutes duration, an inspection of records kept by others, and did not include administration of any psychological tests, nor did such report touch upon the issue of conditional release.

The denial of a conditional release by the court below was erroneous where it was established that the original diagnosis of mental illness was in a state of remission, psychiatrically tantamount

to a cure; where the Appellant was shown to be undergoing "treatment" by incarceration for a newly announced condition described as a sociopathic personality which many psychiatrists and jurists deem not to be a mental illness; where the use of drugs had been discontinued for approximately three years; where no demonstrative fact evidence was introduced to justify or explain the thumbnail medical opinion that Alley would resume the use of drugs with ensuing thefts; and where an adequate system of supervised reporting to hospital authorities would ensure detection of resumption of drug addiction, this, according to the government's testimony, being the only method of testing the hospital's prognostication.

The mandatory commitment statute is unconstitutional in denying an individual his freedom without due process of law. Indefinite confinement of an individual in a mental hospital over an extended period of time should only be allowed where provision is made, at some point in time, for an adversary proceeding at which the restraining authorities have carried the burden of proving the patient mentally ill. The current requirement that an individual to gain even limited freedom must prove his detention arbitrary and capricious, and show beyond a reasonable doubt that he has no abnormal mental condition which would make his

release dangerous to himself or others is violative of due process when an abnormal mental condition has never been judicially established. This violation becomes worse when the restraint is based on a wholly different mental condition than was alleged to exist at the time of the original commitment. The government should be required to prove the existence of the abnormal mental condition or continued confinement under the present burden of proof concept should be restricted to those cases where the criminal trial results not only in acquittal by reason of insanity but results in a finding of then current mental illness.

ARGUMENT

I.

APPELLANT WAS DENIED AN ADEQUATE INDEPENDENT PSYCHIATRIC EXAMINATION WHERE THE COURT APPOINTED PSYCHIATRIST WAS NOT AVAILABLE FOR EXAMINATION AT THE HEARING AND HIS WRITTEN REPORT FAILED TO INDICATE THE SCOPE OF HIS EXAMINATION AND THE FACTS UPON WHICH HIS OPINION WAS BASED.

With respect to Point I, Appellant desires the Court to read the Petition for Appeal, the Order of the District Court, and the following pages of the reporter's transcript: Tr. 2, 7-8, 11, 19-20.

In Watson v. Cameron, 114 U.S. App. D.C. 151, 312 F. 2d 878 (1962), this Court held that an indigent patient at St. Elizabeth's confined for over a year pursuant to the mandatory commitment statute, was entitled, in connection with his petition for a writ of habeas corpus and as a matter of right, to an independent mental examination by a court appointed expert in order to test the findings and conclusions of the hospital staff. The Court did not, however, define the scope of the examination or the extent to which such expert was required to amplify his findings and conclusions.

This Court has recently touched upon the standards for psychiatric examination and testimony in Rollerson v. United States, No. 17,675, decided October 1, 1964 (slip opinion). At page 2, the Court said:

" . . . we think it necessary to point out that the value of a psychiatrist's testimony depends largely upon his opportunities for observation and the facts he observes. The testimony of an expert, like that of any other witness, may be excluded if it reports mere opinion, unsupported by 'underlying facts.'"

At pages 9-10, in criticizing the psychiatric testimony, the Court commented:

"We are not told how many personal interviews of the defendant were conducted. We are not told the extent or content of the staff observations. We are told nothing of the tests the defendants took -- what they were, what they are designed to show, how useful they are considered to be . . .

"The basic tool of psychiatric study remains the personal interview More than three or four hours are necessary to assemble a picture of a man"

This Court at page 10 cited Karl Menninger's book, A Manual for Psychiatric Case Study (2d ed. 1962), page 94 to indicate what kind of examination and report is required by proper clinical standards:

"Finally, it is necessary to explain as well as we can how [the patient's mental condition] came about. This explanation should be written with a minimum of technical jargon and should endeavor to interpret the illness as seen in the light of background and environment in some logical way. It is not enough to say that a patient has a schizophrenic syndrome; why does this patient have the symptoms of that syndrome at this particular time, and what can we expect? This is what relatives and referring physicians and judges and others want to know The emphasis will differ in different cases, but the object is in all cases to explain as well as possible the relations of the various kinds of data to each other."

Finally at page 11, the Court concluded:

"It is axiomatic that a witness must explain the 'observational basis' of his testimony -- i.e., what opportunity

he has to observe, what tests he has performed -- in order to meet even the test of admissibility. 2 Wigmore, Evidence §562. ". . . [I]f the trier believes ['the expert's opinions'] are logically arrived at, they are accepted; if not, they are rejected. It is precisely because the conclusions of the experts must be weighed in this fashion that it is necessary to prove their bases." United States v. Amburgey, 189 F. Supp. 687, 695-96 (D.D.C. 1960). "Time and resources may not permit taking the psychosocial history of each person committed for a 90-day examination, or engaging in extensive personal interviews, or making a collateral investigation But [the psychiatrists] should advise the court when they have been unable to make the kind of examination required by proper clinical standards because of lack of time, facilities, or knowledge." Jackson v. United States, No. 18,225, decided Aug. 7, 1964 (separate opinion) slip op. p. 9."

Appellant contends he failed to receive an adequate independent examination in that there was but a single personal interview lasting approximately thirty minutes, no psychological tests were administered, and the extent of the examination of records kept by the hospital was not disclosed. The paucity of the examination clearly did not meet clinical standards. What is worse, the doctor was not available for examination at the hearing which surprised appellant's counsel [Tr. 2].

Appellant was left only with a short two paragraph report, the all or nothing nature of which did not even touch upon the issue of a conditional release. That report does little more than make passing reference to an examination without indicating its scope or the facts adduced therefrom in support of its final prognostication.

Appellant was diagnosed by St. Elizabeth's staff at the time of his criminal trial as suffering from a chronic brain syndrome, not as a sociopath. Until late 1957, it was the staff policy at St. Elizabeth's Hospital not to consider the descriptive phrase sociopathic personality disturbance as a mental illness or abnormal mental condition unless other symptoms were present, see Blocker v. United States 107 U.S. App. D. C. 63, 274 F. 2d 572 at 577, 579 (1959) and O'Beirne v. Overholser 193 F. Supp. 652 at 657-659 (1961) later reversed. In fact, many psychiatrists still maintain this position. Dr. Dobbs, at least, concurs that it is only sometimes a mental illness [Tr. 15]. It seems unfair that the court should appoint an expert who, in advance, is known to agree with the institution's view of sociopaths when a non-indigent petitioner would have access to experts holding otherwise, see Robertson v. Cameron, 224 F. Supp. 60 at 63-65.

In Robertson, supra, the court said at page 64:

" . . . Until recent years persons who are now known as sociopaths were called psychopaths. They were not regarded as mentally ill; they were not subject to commitment in a civil proceeding; and they could not be acquitted of a criminal offense on the ground of insanity unless indeed the psychopathic personality was accompanied by other complications. It is a well-known fact, and it was corroborated by the last witness called, that at the present time there are some psychiatrists who regard a sociopathic personality as a mental disease and that the psychiatric profession is split, one group looking upon sociopathic personality as a mental disease and the other group adhering to the negative opinion. This is a very unfortunate situation because the rights of a defendant to be acquitted

on grounds of insanity would, under these circumstances depend on the psychiatrist who happens to testify."

The Judge in the Robertson case, went on to point out at

page 65:

"... the American Law Institute in its Model Penal Code proposed a provision expressly indicating that a person known as a sociopathic personality should not be regarded as mentally ill for the purpose of an acquittal on grounds of insanity. This is found in Article 4, Section 4.01, subsection 2, of the Model Penal Code."

Appellant requests that this case be remanded with instructions that Appellant be accorded an independent psychiatric examination meeting the foregoing standards.

II.

IN VIEW OF THE EVIDENCE PRESENTED, THE DISTRICT COURT
ERRED IN NOT GRANTING A CONDITIONAL RELEASE.

With respect to Point II, Appellant desires the Court to
read Exhibit A to the Petition for Appeal, the Order of the District
Court, and the following pages of the reporter's transcript: Tr. 6,
8-20.

Appellant's counsel before the lower Court pleaded for a
conditional release [Tr. 16-20].

In Isaac v. United States, 109 U. S. App. D. C. 34,
284 F. 2d 168 at 172 (1960), this Court set forth the standards
for conditional release:

"If the court's conclusion, either by acceptance of a
certificate to that effect or upon findings, is that the
person has not recovered his sanity but that he will not
in the reasonable future be dangerous to himself or to
others under conditions approved by the court and is
in a condition to be conditionally released under supervi-
sion, the court may order a release upon conditions . . ."

In an earlier case and the first case touching on the issue
of conditional release, this Court said:

"Accordingly, we think that to order conditional release . . .
the court must conclude that the individual has recovered
sufficiently so that . . . under conditions which the statute
empowers the court to impose 'as [it] shall see fit,' --
such person will not in the reasonable future be dangerous
to himself or others" [Hough v. United States, 106 U. S.
App. D.C. 192, 271 F. 2d 458 at 461 (1959)].

Reference is also made to D. C. Code §24-301(e) reproduced

supra.

Clearly, it was within the Court's power to order a conditional release with the imposition of conditions which it saw fit to impose. The Court relied upon medical testimony in refusing such order [Tr. 20]. Certainly, there was no testimony on behalf of Appellant; his court appointed expert wasn't there and the expert's report didn't touch upon this vital issue.

Appellant has not engaged in the use of drugs for some thirty-eight months. The hospital's diagnostic change plus Dr. Dobbs testimony [Tr. 13-14] indicate that Appellant's chronic brain syndrome is in a state of remission, psychiatrically tantamount to cure.

After equivocating on the broad issue of a sociopath's being mentally ill, Dr. Dobbs readily admitted that she:

" . . . never contended, obviously, that incarceration per se will cure anybody, least of all a drug addict. At the same time, the only alternative is one I cannot conscientiously accept" [Tr. 16]

Antecedently, she said:

" . . . I wish I could sincerely believe, much less guarantee, that indeed this would cure Mr. Alley, whom I personally find quite a likable gentlemen, quite personable, and certainly very cooperative on the ward." [Tr. 16].

We are told, by implication, that no further treatment is being accorded Appellant. Judge Holtzoff, in the Robertson case, supra, at page 65, highlighted the despair of Appellant's situation in attempting to

prove a sociopath, i.e., Appellant a frequent past drug user, can reenter society:

"It also must be borne in mind that a sociopathic personality is generally not regarded as curable and a person in that position might find himself imprisoned for life in a mental institution. Surely we cannot use commitments to mental institutions to serve in place of habitual criminal laws"

The crucial point conceded by Dr. Dobbs points to conditional release as the prime hope of the sociopath:

APPELLANT'S COUNSEL: The only way to put these beliefs into effect is to put them to the test; is that correct?

DR. DOBBS: You are quite right there.

In view of the evidence, it is submitted that the District Court erred in not prescribing conditions whereby Appellant could secure limited freedom to prove his ability to abstain from narcotics, e.g., frequent hospital medical examinations to determine whether usage of drugs had been resumed.

III.

D. C. CODE §24-301 (d) IS UNCONSTITUTIONAL BECAUSE IT PROVIDES FOR INDEFINITE CONFINEMENT IN A MENTAL HOSPITAL OF PERSONS WHO HAVE NEVER BEEN ADJUDGED INSANE, WITHOUT PROVIDING ANY PROCEDURE WHICH CASTS THE BURDEN ON THE GOVERNMENT TO PROVE THAT SUCH PERSONS ARE MENTALLY ILL AS A PRE-REQUISITE TO CONTINUED CONFINEMENT.

Although this Court has earlier decided Ragsdale, Curry, Foller and O'Beirne,^{1/} the Supreme Court's opinion in Lynch v. Overholser, 369 U. S. 705 (1962), has reopened the issue and has cast grave doubt on the constitutionality of §24-301 (d) of the D. C. Code. In Lynch, the Supreme Court granted certiorari because of suggested constitutional infirmities in §24-301 (d). See 369 U. S. at 706. Specifically, the constitutionality of the statute was attacked on the ground that mandatory commitment of a person without a present inquiry into current sanity, and about whom the evidence merely warrants a reasonable doubt as to his mental condition at the time of the crime, deprives such person of liberty without due process. However, the Court did not reach this serious constitutional issue because the case was decided by a statutory construction which excluded persons who did not affirmatively raise the insanity defense. However, the Court did give a clear indication of its views:

^{1/} Ragsdale v. Overholser, 1960, 108 U. S. App. D.C. 308, 281 F. 2d 943; Curry v. Overholser, 1960, 109 U. S. App. D.C. 283, 287 F. 2d 137; Foller v. Overholser, 1961, 110 U. S. App. D.C. 239, 292 F. 2d 732; Overholser v. O'Beirne, 1961, 112 U. S. App. D. C. 267, 302 F. 2d 852.

"Of course the post-trial commitment of §24-301 (d) presupposes a determination that the accused has committed the criminal act with which he is charged, whereas pretrial commitment antedates any such finding of guilt. But the fact that the accused has pleaded guilty or that, overcoming some defense other than insanity, the Government has established that he committed a criminal act constitutes only strong evidence that his continued liberty could imperil 'the preservation of public peace'. It no more rationally justifies his indeterminate commitment to a mental institution on a bare reasonable doubt as to past sanity than would any other cogent proof of possible jeopardy to the 'rights of persons and of property' in any civil commitment. [369 U. S. at 714. Emphasis added]

The Court in Lynch went on to discuss, but not decide, what might have persuaded Congress to enact §24-301. See 369 U. S. at 715. Although such considerations as there listed are said to be "pertinent to ascertaining the intended reach of this statutory provision", a review of the legislative history reveals one outstanding flaw. Congress erroneously believed, or was led to believe, that a defendant found no guilty by reason of insanity had, in fact, been found insane.^{2/}

The testimony of George C. Hart, Jr., a proponent of the mandatory commitment bill, espoused the erroneous belief that a not guilty by reason of insanity verdict was a positive finding of insanity.

"In other words, there are two matters of discretion on a person who has been found insane, who has been exculpated

^{2/} It may well be, as the dissent in O'Beirne suggests, that Congress intended §24-301 (d) to apply only to an accused who was affirmatively found to have been insane. If so, Alley was improperly committed under that Section.

from liability for a crime by reason of insanity'. [Hearings on H. R. 6585 before the Subcommittee on Crime Investigation of the House Committee in the District of Columbia, 84th Cong. 1st Sess. (1955) at 21-22. Emphasis added.] 'But our committee felt most strongly that just as the presumption of sanity should continue until overcome, once a person is found insane that presumption of insanity should continue until it is found that the person has recovered.' [Id at 22. Emphasis added]. 'Now, it is our very strong feeling that no person who has been committed to a mental hospital because insane at the time he committed the crime should be released purely on the 'say-so' of the superintendent' [Id at 23. Emphasis added].

Both the Senate and the House Reports also contain evidence that Congress itself erroneously believed that the jury's verdict constituted a positive finding of insanity.

"The Committee believes that a mandatory commitment statute would add much to the public's peace of mind, and to the public safety, without impairing the rights of the accused. Where accused has pleaded insanity as a defense to a crime, and the jury has found that the defendant was, in fact, insane at the time the crime was committed, it is just and reasonable in the Committee's opinion that the insanity, once established, should be presumed to continue and that the accused should automatically be confined for treatment until it can be shown that he has recovered." [H. R. Rep. 892, 84th Cong. 1st Sess. (1955); S. Rep. No. 1170, 84th Cong. 1st Sess., 1955. Emphasis added.]

Yet, this Court and the Supreme Court have now pointed out the error of such an assumption. As the Supreme Court said in Lynch:

In the District of Columbia, as in all federal courts, an accused 'is entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime.' Davis v. United States, 160 U. S. 469, 484. See e.g.

Isaac v. United States, 109 U. S. App. D.C. 34, 284 F. 2d 168. Compare Leland v. Oregon, 343 U. S. 790. Consequently, the trial judge or jury must reach a judgment or verdict of not guilty by reason of insanity even if the evidence as to mental responsibility at the time the offense was committed raises no more than a reasonable doubt of sanity.^{3/}

In Ragsdale v. Overholser, 108 U. S. App. D.C. 308, 281 F. 2d 943 (1960), this Court overcame the constitutional problem of the unlimited confinement of a person who has never been found insane by applying the assumption set up in Orencia v. Overholser, 82 U. S. App. D.C. 285, 163 F. 2d 763 (1947). In Orencia, the Court had said:

[T]hat the appellant was insane at the time she killed her child is not and cannot be questioned, since it was so determined by the jury in the murder case. [82 U. S. App. D.C. at 287]

By applying the Orencia reasoning to Ragsdale, this Court concluded that there was some rational basis for concluding that the defendant in fact was mentally ill at the time of the crime. However, the finding by the Supreme Court in Lynch, decided after Ragsdale, impliedly negated such an application of Orencia by the Court's characterization of the jury's verdict as being but "a bare reasonable doubt as to the past sanity."

^{3/} Note that this confirms the similar statement in Judge Edgerton's dissent in Overholser v. O'Beirne, 112 U. S. App. D.C. at 277: "Though appellant was found 'not guilty by reason of insanity' he was not found to have been insane".

The constitutional issue cannot continue to be denied by the expedient of presuming that the verdict of not guilty by reason of insanity is a positive finding of insanity. Is it not unconstitutional to confine indefinitely in a mental institution a person who has never been judicially found to be mentally ill? At no time in over three years and two months has any governmental authority been required to prove that Appellant is mentally disordered as a prerequisite to continued confinement. Yet release has been denied by the District Court because Appellant has not proved beyond a reasonable doubt that he is free of any abnormal mental condition, i.e., that his continued confinement is arbitrary and capricious [See conclusion of law of the District Court].

Any reasonable restraint on his liberty which should be endured while the hospital determined if an "assumed mental condition" exists has expired. At some point, the clear requirement of the constitutional guarantee against deprivation of liberty without due process calls for a judicial hearing at which the Government must prove Appellant is suffering from an abnormal mental condition in order to continue holding him in confinement.

^{4/} For a discussion of the difficulty of applying Orencia to the instant problem, see Halleck, The Insanity Defense in the District of Columbia, 49 Georgetown L.J. 294 (1960) pp. 308-309. See also the dissenting opinion of Judge Edgerton in Overholser v. O'Beirne, *Supra*, decided prior to the Supreme Court's decision in Lynch.

Absent this, an impossible burden is placed upon a petitioner seeking release. He must show that he has recovered from, or been cured of, any abnormal mental condition and not necessarily the one assumed to exist at the date of the criminal trial. No condition has been shown to exist in the first place. It has merely been "assumed". In the case of the sociopathic personality the situation is virtually hopeless, since hospital "policy" generally precludes certification of release because it is usually impossible to "cure" this so-called abnormal mental condition. Nevertheless, the sociopath (formerly known as a psychopath) is not insane or as mentally ill or diseased or disordered. Dr. Overholser himself has observed that "Dr. Philip Q. Roche of Philadelphia has commented in an article that perhaps the "psychopathic personality" is the 'heretic' or 'witch' in modern guise!" The Psychiatrist and the Law, Winfred Overholser, M. D. p. 55.

As this Court long ago ruled, in In re William M. Bryant, 3 Mackey 489, 14 D.C. 489 (1885), compulsory seclusion in an insane asylum cannot be had without due process of law, and due process of law requires a judicial determination that the person is insane. In referring to statutes providing for confinement of lunatics, this Court said, at page 494:

"They only open its doors to those who have been properly found to be insane persons. If they meant anything else they would be unconstitutional."

Without such proper judicial finding, the due process of law required by the Fifth Amendment to the Constitution has not been afforded to one in Alley's position prior to the deprivation of his liberty. Due process requires a proper judicial finding of insanity in a proper proceeding. Barry v. Hall, 62 App. D.C. 350, 98 F. 2d 222 (1938). Even though appellant might be a law violator, and society entitled to protect itself from him, he cannot be put away indefinitely in an insane asylum until the issue of his alleged abnormal mental condition and resultant dangerous propensities have been judicially determined. Greenwood v. United States, 219 F. 2d 376 (8th Cir. 1955), affirmed 350 U. S. 366 (1956).

Although the Supreme Court did not reach this constitutional point in Lynch, the majority seemed clearly to indicate a doubt. In dissent, Mr. Justice Clark suggested an alternative to a holding of unconstitutionality.

Moreover, if the burden is too heavy, rather than opening the hospital doors to all persons committed under the statute, it would be more fitting to rewrite the release procedures by shifting the burden to the hospital authorities to prove the necessity for further hospitalization. The Court has not hesitated to use a similar device in another area. Coppedge v. United States, 369 U. S. 438, [369 U. S. at 734].

The issue before this Court is well-defined. Surely, it cannot be argued that indefinite, perhaps lifetime, confinement is to be permitted without ever casting upon the government at some point the duty to establish the mental illness and dangerous propensities of the person sought to be confined in a mental institution. Such confinement is plainly a deprivation of the constitutional right to personal liberty, since it originates and continues on the basis of a mere doubt of the petitioner's sanity at a point of time in the past, in the instant case over thirty-eight months ago.

CONCLUSION

The District Court's order should be reversed or, in the alternative, the case should be remanded for such other relief as this Court deems appropriate, and §24-301(d) should be declared unconstitutional as it is presently being applied.

/s/ Robert B. Hirsch

November 10, 1964

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Brief for Appellant was mailed to Dale C. Cameron, M.D., Superintendent, Saint Elizabeth's Hospital, Washington, D. C. and to David C. Acheson, Esquire, United States Attorney for the District of Columbia, United States Court House, Washington, D. C., on this 10th day of November, 1964.

/s/ Robert B. Hirsch
Robert B. Hirsch

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18785

WILLIAM C. ALLEY, APPELLANT

v.

DALE C. CAMERON, SUPERINTENDENT, SAINT ELIZABETHS
HOSPITAL, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
For the District of Columbia Circuit

FILED DEC 31 1964

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CLERK

QUESTIONS PRESENTED

1. Whether appellant was denied an adequate and independent psychiatric examination under the facts of this case.

2. Whether it was an abuse of discretion for the District Court to deny conditional release to appellant where the expert testimony indicated that appellant continues to suffer from an abnormal mental condition which renders him likely to commit offenses against property.

3. Whether the commitment and release procedures provided under § 24-301 of the District of Columbia Code contravene the due process clause of the Fifth Amendment.

(C)

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18785

WILLIAM C. ALLEY, APPELLANT

v.

DALE C. CAMERON, SUPERINTENDENT, SAINT ELIZABETHS
HOSPITAL, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was committed to Saint Elizabeths Hospital September 5, 1962 by order of the United States District Court for the District of Columbia in accordance with the provisions of D.C. Code § 24-301(d) (1961), having been found not guilty by reason of insanity on a charge of forgery and uttering (35 Stat. 1094 (1909), as amended, 18 U.S.C. 494 (1959)).¹

In April, 1963, appellant petitioned the District Court for a writ of habeas corpus, but his petition was dismissed.² He filed a second habeas corpus petition (the instant petition) on September 23, 1963. Judge Tamm permitted this petition to be filed *in forma pauperis*, but then denied it. Subsequently, however, Judge Tamm vacated the denial and issued the writ. Upon the motion of appellant's counsel the court (Judge McGarraghy) ordered an independent examination of appellant

¹ Criminal Case No. 734-61.

² H.C. No. 107-63.

by the Legal Psychiatric Services and a report as to whether appellant was presently suffering from an abnormal mental condition and whether he would be dangerous to himself or others in the reasonably foreseeable future if released.³

A hearing on the habeas corpus petition was held on March 17, 1964. At the hearing, appellant's counsel offered in evidence the report of Dr. David Lanham, Chief of the Legal Psychiatric Services, who had conducted the independent mental examination of appellant. After offering the report in evidence appellant's counsel indicated that he would not call Dr. Lanham to the stand to testify because he would "only testify to the statements the report shows" (Tr. 11). Dr. Lanham's report asserted that appellant continued to suffer from a "Sociopathic Personality Disturbance, Drug Addiction."⁴ The report expressed the belief that appellant would return to addiction if released and would commit crimes to support his habit. This was substantiated in every respect (Tr. 13-14) by Dr. Dorothy Dobbs, staff psychiatrist at Saint Elizabeths and appellant's resident psychiatrist there (Tr. 10, 12). Dr. Dobbs testified that appellant's personality was one of "immature behavior, and inability to tolerate any anxiety or frustration, and the need for immediate gratification, just as one would expect from a tiny infant. Also a disregard for others' feelings and rights in the regard of legal matters" (Tr. 12-13). She further testified that "[i]n addition, in this particular gentleman, we have superimposed on that approximately a 30-year history of drug addiction, both of narcotics and barbiturates" (Tr. 13).

³ This was in accordance with the ruling in *Watson v. Cameron*, 114 U.S. App. D.C. 151, 312 F. 2d 878 (1962), which held that an indigent committed after a verdict of not guilty by reason of insanity is entitled to an independent psychiatric examination after one year of confinement.

⁴ Respondent's return to the instant petition—filed January 2, 1964—asserted that during the period of confinement in St. Elizabeth's Hospital, petitioner had been under the care and observation "of members of the medical staff of Saint Elizabeths Hospital, skilled in the care, diagnosis and treatment of nervous and mental disorders, who are of the opinion that he has not recovered from his abnormal mental condition. 'Sociopathic Personality Disturbance, Drug Addiction, and the respondent is, therefore unable to certify that the petitioner will not be dangerous to himself or others in the reasonable future.'"

Dr. Dobbs agreed with Dr. Lanham's prediction that appellant would return to criminal activities if released. They both thought that his crimes would be against property, but Dr. Dobbs noted at least one instance of physical violence in appellant's past (Tr. 14). Dr. Dobbs also testified that there was a "remote possibility" that appellant was a suicide risk (Tr. 14). She conceded that there was some dispute among psychiatrists as to whether sociopathic personality disturbance was in fact a mental disease, but she unequivocally stated that in appellant's case it was a mental disease (Tr. 15).

Dr. Dobbs' prognosis for appellant's recovery was pessimistic (Tr. 16). She testified that she could not accept either conditional release or transfer to a medium security ward as alternatives to appellant's continued confinement in the maximum security ward of the hospital (Tr. 17).

The only contrary evidence offered was appellant's testimony in his own behalf. While he claimed that he would try not to return to the use of drugs (Tr. 6, 8, 10, 11), he readily admitted that it was quite possible that he would (Tr. 6, 11). Appellant had not been permitted the use of drugs during his hospital confinement (Tr. 10), but the record shows that appellant has a thirty-year history of drug addiction (Tr. 13).

After hearing Dr. Dobbs' testimony and that of the appellant and considering the report of the independent psychiatrist the court stated that it was "not going to disregard medical testimony" (Tr. 20). The court found that appellant "is suffering from an abnormal mental condition, sociopathic personality disturbance, drug addiction, and would be dangerous to himself or others if released into the community," and concluded that he had "failed to sustain his burden of proving his eligibility for release under the statute," and had "not shown that the failure of the Superintendent to certify him for release is arbitrary or capricious." Accordingly, on March 25, 1964, the court discharged the writ, dismissed the petition, and remanded appellant to the custody of respondent. On April 7, 1964, the District Court denied appellant leave to appeal *in forma pauperis*. On June 13, 1964, this Court granted him leave to prosecute such an appeal.

STATUTE INVOLVED

Title 24, § 301, District of Columbia Code, provides in pertinent part:

• • • • •

(d) If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find,

the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released under supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section: *Provided*, That the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

(g) Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

SUMMARY OF ARGUMENT

I

Appellant received an independent psychiatric examination within the meaning of *Watson v. Cameron*, which requires that an indigent petitioner committed under D.C. Code § 24-301(d) and confined for more than one year be afforded such an examination in order to test the conclusions of the staff of the hospital at which the petitioner is confined.

Appellant's own counsel conceded at the hearing the independence of the examination. The sole ground on which such independence is questioned here is that the expert who was appointed, like the hospital at which petitioner was confined,

classified sociopaths as suffering from a mental disease. But a mere professional inclination is no grounds for disqualification. Appellant's case was judged on its merits. That a person of means might have uncovered a psychiatrist who would testify in his favor raises no constitutional question.

II

The adequacy of the examination by Dr. Lanham is not properly before this Court because the issue never was raised in the trial court. In any event, there is no requirement that the psychiatrist interview the petitioner on more than one day, or administer a particular type of test, as appellant suggests. The scope and type of the examination necessarily must involve the exercise of discretion by the psychiatrist.

III

There is no requirement that the independent examiner in fact report back to the court. The only requirement imposed by this Court in *Watson v. Cameron* is that the petitioner be examined. In any event, the report in the present case, which was submitted pursuant to an order of the court below, was adequate. There was no request by the court that the report take any particular form, but only that it inform the court whether appellant was suffering from a mental disease and whether he would be dangerous if released. Furthermore, counsel for appellant specifically asked for the report's admission and made no effort to obtain the presence of the independent examiner in order that he might question him on the bases for his conclusions.

IV

It was proper for the court to refuse even conditional release in light of the expert's conclusions that appellant was still suffering from an abnormal mental condition which made him dangerous to other (*viz.*, a propensity to commit crimes against property; a disregard for others' legal rights; an infantile need for immediate gratification of desires). This is especially true in view of the fact that nothing more was arrayed against the unanimous views of the psychiatrists than appellant's own self-

serving statements that he did not think he would resume the use of drugs. Even appellant would not categorically say that he could live up to his own expectations, and he readily admitted that he might fall back on narcotics with all the dangers that would entail both for himself and the community.

V

Appellant asks this Court to overrule a long line of cases sustaining the constitutionality of the commitment and release procedures of D.C. Code § 24-301(d). He premises this request upon *Lynch v. Overholser*. The *Lynch* case, however, held only that D.C. Code § 24-301(d) does not authorize the commitment of a person who does not himself raise the defense of insanity. The court explicitly refused to decide the constitutional issue. The commitment statute has no constitutional infirmity. A verdict of not guilty by reason of insanity carries with it a finding that the person so acquitted did in fact commit the crime. Thus, there is a rational connection between such a verdict and mandatory commitment. If the hospital to which he is committed does not certify him for release appellant may seek a writ of habeas corpus. As it was appellant who raised the question of his sanity and as he has committed harmful acts proscribed by law, there can be no objection to placing the burden of proving freedom from an abnormal mental condition on him.

ARGUMENT

I. Appellant received an independent psychiatric examination (See Tr. 2, 7, 13, 14)

In *Watson v. Cameron*, 114 U.S. App. D.C. 151, 312 F. 2d 878 (1962), this Court, in requiring that an indigent petitioner committed under D.C. Code § 24-301(d) and confined for more than one year, be given an "independent" psychiatric examination, indicated that it meant an examination by a psychiatrist not a member of the staff of the hospital where the petitioner is confined. 114 U.S. App. D.C. at 152, 153, 312 F. 2d at 879, 880. Dr. Lanham is chief of the Legal Psychiatric Services—an independent service created, *inter alia*, to aid district judges in handling of criminal cases. D.C. Code,

§ 24-106 (1961). He is not a member of the staff at Saint Elizabeths Hospital.

At no time during the habeas corpus hearing did appellant claim that Dr. Lanham's examination was anything but fair and impartial. On the contrary, appellant's counsel explicitly recognized the independence of the examination. At the commencement of the hearing the court asked whether it was appellant's contention that he did not have an independent examination, and his counsel said, "[H]e has had an independent examination, Your Honor" (Tr. 2). In response to questioning from his own counsel, appellant stated that he was satisfied with the doctor who had examined him and he expressed no reservations about Dr. Lanham's impartiality (Tr. 7).

To appellant, "[i]t seems unfair that the court should appoint an expert who, in advance, is known to agree with the institution's view of sociopaths when a non-indigent petitioner would have access to experts holding otherwise" (Brief for Appellant, p. 15). The record does not show that the court knew of Dr. Lanham's views "in advance." More fundamentally, the court is under no obligation to rule out a psychiatrist who may harbor a particular view on a matter upon which there is dispute within the psychiatric profession. A disqualifying partiality "means something more than an ideological bent." Gellhorn and Byse, *Administrative Law Cases and Comments* 935 (4th ed. 1960). See also *Federal Trade Commission v. Cement Institute*, 333 U.S. 638 (1948); 2 Davis, *Administrative Law Treatise*, Section 12.01 (1958). There is no evidence that Dr. Lanham did not judge appellant's case on its individual merits.⁵

⁵ Insofar as appellant may be urging that a sociopathic personality disturbance, as a matter of law, is not an "abnormal mental condition" within the meaning of D.C. Code § 24-301, or to draw support from a change in appellant's diagnosis which at the time of trial, included "chronic brain syndrome, superimposed on this long, longstanding personality disorder" (Tr. 13, 14), he is foreclosed by the decisions of this Court. *Overholser v. O'Beirne*, 112 U.S. App. D.C. 267, 302 F. 2d 852 (1962); *Hough v. United States*, 106 U.S. App. D.C. 192, 195, 271 F. 2d 458, 461 (1959); *Overholser v. Leach*, 103 U.S. App. D.C. 280, 292, 257, F. 2d 667, 670 (1958), cert. denied, 359 U.S. 1013 (1959). As this Court said in *Overholser v. O'Beirne*, supra at 273-274, 281 F. 2d at 858-859:

"The issue is not whether [the defendant] now has a 'mental disease' but whether he has an 'abnormal mental condition'. . . . That concept

The *Watson* case requires only an *independent* examination—not an examination by a psychiatrist with a professional inclination favorable to appellant's cause. The fact that "a defendant of ample private wealth would perhaps have been able to find a more favorable psychiatrist somewhere in the United States, or even in Europe" does not oblige the Government to make similar efforts on behalf of an indigent. Cf. *McGarty v. O'Brien*, 188 F. 2d 151 (C.A. 1, 1951), *cert. denied*, 341 U.S. 928.

II. The independent examination which appellant received was adequate

Appellant complains that the psychiatric examination conducted by Dr. Lanham was inadequate (Br. 14). Appellant's counsel, however, made no objection below to the adequacy of Dr. Lanham's examination. Thus, the issue was not raised in that court, and is not properly before this Court. *Madison v. Phillips*, 103 U.S. App. D.C. 11, 254 F. 2d 348 (1958); *Friedman v. Decatur Corporation*, 77 U.S. App. D.C. 326, 135 F. 2d 812 (1943). In *Weiss v. Duro Chrome Corp.*, 207 F. 2d 298, 300 (C.A. 8, 1953), the court summarized the basis for refusing to consider on appeal issues not presented below:

The trial court having had no opportunity of passing upon the question now for the first time presented cannot be charged for failing to do that which it was not requested to do.

The record, moreover, shows that Dr. Lanham examined appellant on February 25, 1964 (Report of Dr. Lanham) and also inspected the hospital records.* There is no requirement that a psychiatrist appointed to conduct an independent examination interview the petitioner on more than one day, or administer a particular type of test, as appellant suggests (Br. 14).

[i.e., "abnormal mental condition"] means that a patient . . . may progress from a true and undisputed "mental disease" such as a psychosis, which he formerly had, to his present undisputed state of "sociopathic personality disturbance, antisocial reaction." But that result does not qualify him for release; he cannot be released until the process of recovery reaches the point that his release will not expose him or others to danger."

* Although appellant claims in his brief that the examination lasted thirty minutes (Br. 14), he cites no record support for this statement.

The scope and type of the examination necessarily involved the exercise of discretion by the psychiatrist.

In *Rollerson v. United States*, No. 17675, decided October 1, 1964, upon which appellant relies, the issue was whether the appellant's insanity defense was sufficiently rebutted by psychiatric testimony offered by the Government. Although this Court did not reverse the robbery conviction, it criticized the testimony of the psychiatrists offered as Government witnesses for lack of detail. While the court also remarked that "more than three or four hours are necessary to assemble a picture of a man," it is apparent that the Court was concerned only with the fact that evidence of mental illness does not necessarily show itself at first. Thus the Court continued:

A person sometimes refuses for the first several interviews to reveal his delusional thinking, or other evidence of mental disease. Menninger, *A Manual for Psychiatric Case Study*, ch. 1-4 *passim*. (2d ed. 1962) (hereafter cited as *Menninger*). See Noyes & Kolb, *Modern Clinical Psychiatry*, ch. 7 (with bibliography); Knight, *Borderline States*, 17 *Bull. of Menninger Clinic* 1, 8 (1953). Paranoid patients particularly may be able to guard against revealing their disorder with extraordinary skill. *Menninger* 64-65. See Noyes & Kolb, *Modern Clinical Psychiatry* 112-13.

While a psychiatrist may not be able, from a single interview, to determine that a person is sane, it obviously does not follow that such an interview (supplemented, as here, by an inspection of appellant's medical records) cannot suffice to establish that the person examined is suffering from an abnormal mental condition.

III. There is no infirmity in the report of the examining psychiatrist

(See Tr. 2, 11)

Appellant suggests further that Dr. Lanham's report was inadequate (Br. 14). But the requirement of *Watson v. Cameron* is only that an indigent petitioner be afforded the opportunity to have an *examination* by an independent expert to test

the findings and conclusions of the staff of the hospital at which he is confined. This Court did not require that the independent expert report to the court. A psychiatrist engaged by a petitioner of means would be under no such obligation.

Dr. Lanham's report was submitted pursuant to the District Court's order referring the matter to the Legal Psychiatric Services. The order required only "a written report" as to (1) "whether petitioner is presently suffering from an abnormal mental condition" and (2) whether he would be dangerous to himself or others within the reasonably foreseeable future if released into the community. The order did not specify that the psychiatrist should make a recommendation with respect to conditional release, or that the report should take any particular form. While we do not question the power of the court to require a report of the independent examiner, the requirement imposed in the present case was satisfied here. As to the question of conditional release, moreover, it is obvious from the report which expressed the likelihood that appellant would commit new criminal acts if he were released into the community, that it was the psychiatrist's opinion that appellant should remain in the hospital.

The report, which was admitted into evidence at the express request of appellant's counsel (Tr. 11), informed the court of Dr. Lanham's conclusion as to appellant's mental condition, and of the basis for that conclusion, i.e., observation of the appellant and examination of his medical records. If appellant's counsel wished to elicit further information from Dr. Lanham, it was his duty to assure the doctor's presence at the hearing as a witness, instead of assuming that Dr. Lanham would be there (Tr. 2).⁷

IV. The Court did not abuse its discretion in refusing to grant appellant a conditional release

(See Tr. 6, 8, 10, 11, 14, 15, 16, 17, 20)

The authority to order a conditional release of an inmate of Saint Elizabeths Hospital is within the discretion of the habeas corpus court, to be exercised "in light of the basic policy under-

⁷ Appellant's counsel did not even request a continuance upon learning that Dr. Lanham was not present (Tr. 2).

lying the statute [Section 24-301, D.C. Code (1961)]." *Hough v. United States*, *supra* at 195, 271 F. 2d at 461. This policy is to provide treatment and cure for the individual in a "manner which affords reasonable assurance for the public safety." Thus, to order conditional release the court must conclude that there has been sufficient recovery so that under the proposed conditions the individual will not be dangerous either to himself or others. *Hough v. United States*, *supra* at 196, 271 F. 2d at 461; *Overholser v. Leach*, *supra*, at 292, 257 F. 2d at 670.

At the habeas corpus hearing, Dr. Dobbs agreed with Dr. Lanham's diagnosis of "sociopathic personality disturbance, drug addiction" (Tr. 15). Dr. Dobbs testified to appellant's "inability to tolerate any anxiety or frustration," to his "need for immediate gratification," and to his disregard "for others' feelings and rights in the regard of legal matters" (Tr. 14). She also testified that, in her opinion, appellant "would, if he were released, be dangerous to himself or others" (Tr. 14). To be sure, she saw little evidence of physical violence in appellant's past history, although she recalled "one episode from the record" in 1951. And she did not see appellant "as a serious suicidal risk," although she thought there was "a remote possibility" (Tr. 14). But she believed appellant to be dangerous

* * * in the sense of continuing his past pattern of use of drugs at all times, which certainly is dangerous to himself and to others in the sense of * * * well, he has admitted to me over the years to shoplifting and stealing to support his habit.

Thus, Dr. Dobbs agreed with Dr. Lanham's conclusion that, although appellant would not be likely to commit crimes of violence, he would be likely to commit offenses against property (Tr. 15).

Dr. Dobbs also thought that conditional release would not be warranted because, in her opinion, appellant was "quite experienced in his faults" and was unable "to go out and live up to his expectations." She believed that if appellant were conditionally released, "he would fall backwards again to the use of drugs, and would not be able to live up to the terms of the conditional release" (Tr. 16-17).

Opposed to the unanimous views of the psychiatrists we have only the self-serving statements of the appellant that he did not think he would return to the use of narcotics (Tr. 6, 8, 10, 11), but even he admitted that he could very well resume use of drugs with all the dangers that this would entail for himself and the community (Tr. 6, 11). The fact that appellant has not used drugs in the last three years is hardly conclusive (or even persuasive) evidence that he can live without them, for during this time he has been under constant supervision and drugs have not been available to him (Tr. 10).

The refusal of the court below to grant appellant a conditional release was based on unwillingness to disregard the medical testimony (Tr. 20), which fully supported the court's finding that appellant was suffering from an abnormal mental condition and would be dangerous to himself or others if released into the community. To be dangerous, a criminal act need not be a crime of violence. As this Court declared in *Overholser v. Russell*, 108 U.S. App. D.C. 400, 403, 283 F. 2d 195, 198 (1960):

We think the danger to the public need not be possible physical violence or a crime of violence. It is enough if there is competent evidence that [the petitioner] may commit any criminal act, for any such act will injure others. * * *

Appellant suggests that the only way to prove the truth of the medical conclusions as to his dangerousness is to release him (Br. 18-19). But this Court has not condoned such experimentation. On the contrary, as this Court said in *Ragsdale v. Overholser*, 108 U.S. App. D.C. 308, 312, 281 F. 2d 943, 947 (1960):

The primary purpose of the statute—protection for the public and for the subject—suggests at once that the burden [of proof] on petitioner was intended by Congress to be heavy.

Thus, even "[in] a * * * case * * * where the preponderance of the evidence favors the petitioner, the doubt, if reasonable doubt exists about danger to the public or the patient, cannot be resolved so as to risk danger to the public

or individual. * * * If an 'abnormal mental condition' renders him potentially dangerous, reasonable medical doubts or reasonable judicial doubts are to be resolved in favor of the public and in favor of the subject's safety." *Ibid.*

V. The commitment and release procedures of D.C. Code § 24-301(d) are constitutional

Appellant asks that a long line of cases decided by this Court upholding the constitutionality of § 24-301(d) be overruled. *E.g., Overholser v. O'Beirne, supra; Foller v. Overholser*, 110 U.S. App. D.C. 239, 292 F. 2d 732 (1961); *Curry v. Overholser*, 109 U.S. App. D.C. 283, 287 F. 2d 137 (1960); *Ragsdale v. Overholser, supra*. As justification for this action, he cites the decision in *Lynch v. Overholser*, 369 U.S. 705 (1962). The *Lynch* case, however, determined no constitutional question. The Supreme Court there ruled only that D.C. Code § 24-301 (d) authorizes the commitment only of a person who has pleaded the defense of insanity and who has been found not guilty by reason of insanity. The court specifically disclaimed any intention to rule on the constitutional issue there mooted. The court said at 369 U.S. 709-710:

Petitioner maintains, however, that his confinement is illegal for a variety of other reasons, among which is the assertion that the "mandatory commitment" provision, as applied to an accused who protests that he is presently sane and that the crime he committed was not the product of mental illness, deprives one so situated of liberty without due process of law. We find it unnecessary to consider this and other constitutional claims concerning the fairness of the Municipal Court proceeding, since we read § 24-301(d) as applicable only to a defendant acquitted on the ground of insanity who has affirmatively relied upon a defense of insanity, and not to one, like the petitioner, who has maintained that he was mentally responsible when the alleged offense was committed.

In any event the constitutional argument of appellant is without merit.

A. Implicit in a verdict of not guilty by reason of insanity are two subsidiary findings: (1) that the defendant committed the crime with which he is charged⁹ and (2) that there exists some rational basis for believing that the defendant's criminal act was the product of a mental disease or defect. *Ragsdale v. Overholser*, *supra* at 313, 281 F. 2d at 948. It is on this basis that the mandatory commitment procedure works.

The power of a court to commit defendants acquitted by reason of insanity was recognized at an early date,¹⁰ and today defendants so acquitted are nearly always committed.¹¹ Twelve states and the Virgin Islands provide for mandatory commitment similar to that required by the District of Columbia. *Lynch v. Overholser*, *supra* at 709 n.4.

This Court has uniformly held that a defendant acquitted by reason of insanity is not denied due process by commitment to a hospital without further hearing on his sanity at the time of commitment, provided that there are means available thereafter for securing his release.¹² There is substantial support for this position in other jurisdictions.¹³ The provision of a habeas corpus proceeding to determine the validity of continued confinement meets the due process requirement that a hearing be provided at some stage in the proceedings. *Bailey v. Anderson*, 326 U.S. 203 (1945); *Bragg v. Weaver*, 251 U.S. 57 (1919); *Ragsdale v. Overholser*, *supra*, at 313, 281 F. 2d at 948.

B. The fact that in the District of Columbia a verdict of not guilty by reason of insanity imports no more than a reason-

⁹ Compare the British terminology "guilty but insane." Royal Commission on Capital Punishment, 1949-1953 Report at 156 (Cmd. 8392).

¹⁰ *Hadfield's Case*, 27 Howell State Trials 1281, 1354-1356 (K.B. 1800); Williams, *Criminal Law: The General Part*, § 89 (1953).

¹¹ See Comment, *Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration*, 68 Yale L. J. 293 (1958).

¹² See cases collected at note to D.C. Code 24-301(a) that a habeas corpus proceeding is always available to a defendant committed under §24-301(d).

¹³ See *People ex rel. Peabody v. Chanler*, 133 App. Div. 159, 117 N.Y.S. 322, *aff'd*, 196 N.Y.S. 25, 89 N.E. 1109 (1909); *Ex parte Slayback*, 209 Cal. 486, 288 Pac. 769 (1930); *State v. Saffron*, 146 Wash. 202, 262 Pac. 970 (1927); *Ex parte Clark*, 86 Kan. 539, 121 Pac. 492 (1912); *People v. Dubino*, 304 Mich. 363, 8 N.W. 2d 90, *cert. denied*, 319 U.S. 706 (1943).

able doubt about the defendant's sanity does not create any constitutional infirmity in the commitment statute.¹³

The statute makes the rational assumption that a finding of not guilty by reason of insanity (i.e., that the defendant committed an act proscribed by law, but that there is a reasonable doubt as to whether the act was the product of a mental disease or defect) supports the inference that the defendant may be mentally ill and may, therefore, repeat his criminal conduct if not treated. Congress made a permissible choice in reconciling conflicting interests—too stringent standards for commitment might discourage a raising of the defense by those entitled to its protection; too lax a standard might make juries unwilling to acquit defendants on the ground of insanity for fear that their release would seriously endanger the public. The choice is hardly so irrational as to offend due process. The commitment which follows from a reasonable doubt as to sanity is only the corollary of the rule that the defendant be acquitted where there is only a reasonable doubt as to sanity. *Cf. Curry v. Overholser, supra* at 285-286, 287 F. 2d at 139-140.

Congress properly could conclude that a hearing immediately following the verdict to determine defendant's present mental condition would be meaningless for lack of a reasonable opportunity for psychiatric observation and examination. The examination must necessarily come some time after the verdict. Surely it is reasonable, under these circumstances, to refuse to permit such a person to remain at large while psychiatrists determine whether he is dangerous; premature release may lead to the commission of new crimes. *Ragsdale v. Overholser, supra*, at 313, 281 F. 2d at 948.

¹³ Judge Fahy, concurring in *Ragsdale, supra*, at 314, 281 F. 2d at 950, said that "it is not undue process of law for society, in seeking a solution to the problem with which the legislation copes, to use such a provision as section 24-301, notwithstanding there is no finding of insanity but only a doubt with respect to sanity, when section 24-301 comes into operation." Appellant's contention that Congress intended to make the statute apply only where there had been an actual finding of insanity is not well taken. Section 24-301(d) was written as an answer to this Court's ruling in *Durham v. United States*, 94 U.S. App. D.C. 228, 214 F. 2d 862 (1954). But *Durham* itself recognized that the verdict of not guilty by reason of insanity meant no more than that a reasonable doubt existed as to sanity. *Id.* at 232, 214 F. 2d at 866.

C. Nor is there any due process infirmity in the release procedures of D.C. Code § 24-301(e). To obtain his release in a habeas corpus proceeding a petitioner must show that the hospital superintendent's refusal to certify him is arbitrary and capricious, *Overholser v. Leach*, *supra* at 291, 257 F. 2d at 669, and that there is no reasonable doubt that he is dangerous to himself or others. *Ragsdale v. Overholser*, *supra* at 312, 281 F. 2d at 947. These are permissible standards. Release after acquittal by reason of insanity requires a stronger showing of restoration to sanity than would be required in a non-criminal case. *In re Dubina*, 311 Mich. 482, 18 N.W. 2d 902 (1945); *Weihofen & Overholser, Commitment of the Mentally Ill*, 24 Tex. L. Rev. 307, 329 n.68 (1945). As the Supreme Court said in *Lynch*, *supra* at 715:

Congress might have thought * * * that having successfully claimed insanity to avoid punishment, the accused should then bear the burden of proving that he is no longer subject to the same mental abnormality which produced his criminal acts.

It is not unreasonable for this burden to be a heavy one. *Barry v. White*, 62 U.S. App. D.C. 69, 64 F. 2d 707 (1933). But the burden-of-proof question is not an open one. In *Leland v. Oregon*, 343 U.S. 790 (1952), the Supreme Court specifically upheld an Oregon statute which required the defendant to prove his insanity defense beyond a reasonable doubt. The Supreme Court found no due process infirmity in the Oregon procedure because it could not say "that policy violates generally accepted concepts of basic standards of justice." In *Leland* the defendant had been tried for murder in the first degree and sentenced to death. In the present case the procedure concerns only the release of a patient from a mental hospital. If the Fourteenth Amendment was not offended in *Leland*, the Fifth Amendment is hardly offended here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court be affirmed.

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